



**THE ATTORNEY GENERAL
OF TEXAS**

R-54

AUSTIN 11, TEXAS

**JOHN BEN SHEPPERD
ATTORNEY GENERAL**

April 1, 1953

Hon. Max C. Smith, Chairman
House Appropriations Committee
Fifty-third Legislature
Austin, Texas

Letter Opinion No. MS-13.

Re: Legality of expenditures
from the Unemployment Com-
pensation Administration
Fund if the fund is not
appropriated to Texas Em-
ployment Commission by the
Legislature.

Dear Sir:

Your opinion request asks whether the Texas Employment Commission may make expenditures from the Unemployment Compensation Administration Fund subsequent to August 31, 1953, without an appropriation by the Legislature.

The applicable portion of Section 6, Article VIII of the Texas Constitution, provides that "no money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years. . . ." The accepted judicial construction of this Section for over fifty years has been that it "not only requires an appropriation before any money can be paid out of the Treasury, but also limits every appropriation to a term of two years." Pickle v. Finley, 91 Tex. 484, 44 S.W. 480, 481 (1898) (emphasis added throughout). Obviously, your question will be answered by determining whether the Unemployment Compensation Administration Fund (hereinafter called Administration Fund) is "in" the State Treasury in the constitutional sense, thereby necessitating biennial appropriation in order for it to be "drawn from" or "paid out of" the Treasury.

The determination of whether a given fund is or is not "in" the State Treasury is, in every case, a matter of construing the legislative intent thereon from the statute creating the fund in question. The rules to be

Hon. Max C. Smith, page 2 (MS-13)

followed are the same as those employed in any statutory interpretation problem. The plain meaning of the words used by the Legislature as well as the objects and purposes sought to be attained by the statute must be considered. Both criteria were used by the Texas Supreme Court in the leading case of Manion v. Lockhart, 131 Tex. 175, 114 S.W.2d 216 (1938), wherein the Court stated at page 218:

"The previous law was amended by the enactment of article 3644 et seq., under which this cause arose, and those articles now provide that funds derived from the proceedings thereunder shall be 'paid to the State Treasurer,' and not 'into the State Treasury,' as demanded under the escheat statutes, article 3272 et seq., and under the provisions of the old law. . . . The clear purpose of the law, as we construe it, is that the treasurer shall keep a record of such funds, and be prepared to pay claimants the amounts due them when the law has been complied with. In other words, the State Treasurer becomes a custodian or trustee by virtue of the articles of the statutes. Smith et al. v. Paschal et al., Tex.Com.App., 1 S.W.2d 1086."

The Administration Fund was created by Section 13 of Chapter 482, Acts of the Forty-fourth Legislature, Third Called Session (1936), the same being presently codified as Article 5221b-11 of Vernon's Civil Statutes. Section 13 was amended in certain particulars in 1937, 1939 and 1941, but the following unambiguous language has never been altered:

"Sec. 13. (a) Special Fund: There is hereby created in the State Treasury a special fund to be known as the Unemployment Compensation Administration Fund. . . . All monies in this fund shall be deposited, administered and disbursed, in the same manner and under the same conditions and

requirements as is provided by law for other special funds in the State Treasury. . . ."¹

We think the plain meaning and obvious legal effect of this language is not overcome by other language in Section 13 which, though less clear in meaning and effect, does indicate that the Legislature may have intended that the Administration Fund should be held "out of" the State Treasury and placed in the hands of the State Treasurer merely as trustee. We refer in particular to the sentence "Any balances in this fund shall not lapse at any time, but shall be continuously available to the Commission for expenditure consistent with this Act."²

Moreover, our construction of the objects and purposes sought to be attained by Section 13 does not require the conclusion that the Legislature must have intended that the Administration Fund be held "out of" the State Treasury.³

1/ Further evidence that the Legislature considered the Administration Fund to be public moneys "in" the Treasury is the fact that a proviso added in the 1937 amendment requiring that the Fund "be administered separate and apart from all public moneys or funds of the State" was repealed and deleted from Section 13 in 1941. Compare Acts, 45th Leg., 1937, ch. 67, sec. 5, p. 126 with Acts, 47th Leg., 1941, ch. 364, sec. 1, p. 595.

2/ When originally enacted the proviso in Section 13 requiring that the Treasurer give a "separate and additional bond" in connection with the Administration Fund would be an additional argument that the Administration Fund was not intended to be placed "in" the Treasury, but this special bonding requirement has been repealed and he is now liable only "on his official bond." Acts, 47th Leg., 1941, ch. 364, p. 594.

3/ In connection with this conclusion we desire to state that in the present case the legislative intent to include "in" the Treasury is sufficiently clear that the nature of the public funds in the Administration Fund--State or Federal--need not be decided. Whether State or Federal in nature, the Administration Fund is "in" and is subject to Article VIII, Section 6. But in a closer case in which the Legislature's intent is less clear, the nature of the fund would constitute an important interpretation factor. It is our opinion that the framers of

Hon. Max C. Smith, page 4 (MS-13)

We have had the benefit of a brief furnished by the Texas Employment Commission on the question presented in your request. The principle thesis advanced in this brief is that sections of the statute relating to the Administration Fund are substantially identical with sections of the statute governing the Unemployment Compensation Fund (hereinafter called Compensation Fund) and that, because substantially identical, this opinion should be controlled by Friedman v. American Surety Co., 137 Tex. 149, 151 S.W.2d 570 (1941), wherein the Court stated that the Compensation Fund was not subject to Article VIII, Section 6. We cannot accept this proposition. In the first place, the provisions of the present Article 5221b-11 (Administration Fund) set out above as "Sec. 13," are not the same as the provisions of Section 9 of Chapter 482, codified as Article 5221b-7 (Compensation Fund), that were construed in the Friedman case. At the time of the Friedman case there was no language in Section 9 saying or implying that the Compensation Fund was "in" the Treasury.⁴

3/ continued.

the Texas Constitution never considered the possibility that any public funds of the State would be kept anywhere except "in" the State Treasury where they would be subject to the continuing legislative scrutiny and control guaranteed by Article VIII, Section 6. We have not had the opportunity to give this subject the detailed consideration that it merits but we are satisfied that the practice of permitting various public moneys of the State to be kept "out of" the State Treasury in the "custody" of the Treasurer, or in the custody of other State officials, is a practice that has been conceived and developed after the present Constitution was ratified in 1876.

4/ As amended in 1939, and as considered in the Friedman case, Section 9 provided, among other things, as follows:

"Sec. 9(a) Establishment and Control:
There is hereby established a special fund, separate and apart from all public moneys or funds of this State, an Unemployment Compensation Fund, which shall be administered by the Commission exclusively for the purposes of this Act. . . .

"(b) Accounts and Deposit: The State Treasurer shall be treasurer and custodian

Moreover the Legislature, in enacting the law passed on in the Friedman case, indicated unequivocally that it did not intend that the Compensation Fund should be subject to any provisions of law relating to release and disbursement which were "contrary" to the clearance procedure specified.⁴ By so providing the Legislature in 1939 must have intended that the Compensation Fund should be held "out of" the Treasury--an intention which was not negatived or questioned by other language it used.

In the second place we cannot accept the proposition advanced above because we doubt that the Friedman case should be taken as absolutely controlling the present position of the Compensation Fund, far less as controlling the present relation of the Administration Fund with the State Treasury. The brief appears to be based on the assumption that since the Friedman case stated that the Compensation Fund was not "in" the Treasury on April 9, 1941, said Fund was "out of" the Treasury for all time. Without attempting a complete analysis of the present status of the Friedman case, we desire first to point out that what was there said with reference to Article VIII, Section 6 was probably dictum which is not binding as precedent because not necessary to answer the single question there certified and because at page 580 of 151 Southwestern

⁴/ continued.

of the fund who shall administer such fund in accordance with the directions of the Commission and the Comptroller shall issue warrants upon it in accordance with such regulations as the Commission may prescribe. . . . After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of Treasury of the United States of America to the credit of the account of this State in the Unemployment Trust Fund, established and maintained pursuant to Section 904 of the Social Security Act, as amended, any provisions of law in this State relating to deposit, administration, release, or disbursement of moneys in the possession or custody of the State to the contrary notwithstanding. . . . The Treasurer shall give a separate bond . . . " Acts, 46th Leg., 1939, S.B. 21, Sec. 6, pp. 445-446.

Hon. Max C. Smith, page 6 (MS-13)

Second Series, the majority opinion expressly admitted that the facts certified presented no question "in regard to the paying out of money" (which is the subject of Article VIII, Section 6). Secondly, we desire to point out that in connection with the express admission just noted, the Friedman majority suggests that the safer course requires that the Compensation Fund be appropriated each biennium.

In view of these considerations it is our opinion that the Texas Employment Commission may not make expenditures from the Administration Fund subsequent to August 31, 1953, without an appropriation by the Legislature.

Incidentally, since we consciously did not attempt in Letter Opinion No. MS-06 to advise on whether State functions not supported by any appropriation should be or could be included in the Legislative Budget Board draft of the biennial appropriation bill for the fiscal years beginning September 1, 1953, we have seen fit to re-examine that draft to see if any appropriation of the Administration Fund and Compensation Fund is contained therein. Our search convinces us that said draft contains no appropriation of these funds. Neither fund would be appropriated by Article VI, Section 14 of the proposed Act because the general appropriating language of that Section is limited to "agencies of the State named in this Act." Obviously, we have not given any consideration in this opinion to any items other than the Administration Fund and the Compensation Fund, and we should not be understood to have passed on any other matters in this opinion.

Yours very truly,

JOHN BEN SHEPPERD
Attorney General

By *Phillip Robinson*
Phillip Robinson
Assistant

PR:wb